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March 14, 1996

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

VIA HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: Reply Comments in Response to Notice of Proposed Rulemaking, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 -- Rate Regulation, Uniform Rate Setting Methodology, CS Docket No. 95-174

Dear Mr. Caton:

On behalf of the City of Ann Arbor, Michigan; City of Dubuque, Iowa; the Consolidated City of Indianapolis, Indiana; Montgomery County, Maryland; and the City of St. Louis, Missouri (the "Local Franchise Authority Coalition"), I enclose for filing an original and four copies of an amended version of the Local Franchise Authority Coalition's Reply Comments in the above-captioned proceeding.

The amendment is necessary because the caption of the original document referred to DA 95-737, rather than the correct docket number, which is CS Docket No. 95-174. The text of the document has not been amended in any way. We regret any inconvenience.

I have also enclosed an additional copy of the amended Reply Comments to be date-stamped and returned to the undersigned. Any questions should be directed to the undersigned.

Very truly yours,

MILLER, CANFIELD, PADDOCK AND STONE

By Matthew Ames
Matthew C. Ames

Enclosure

cc: The Honorable Reed E. Hundt
The Honorable James H. Quello
The Honorable Andrew C. Barrett
The Honorable Rachelle B. Chong
The Honorable Susan Ness
Ms. Meredith J. Jones
Mr. Larry Walke
Mr. Gregory J. Vogt

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	CS Docket No. 95-174
Uniform Rate-Setting Methodology	)	

JOINT REPLY COMMENTS OF THE CITY OF ANN ARBOR, MICHIGAN; THE CITY OF DUBUQUE, IOWA; THE CONSOLIDATED CITY OF INDIANAPOLIS, INDIANA; MONTGOMERY COUNTY, MARYLAND; AND THE CITY OF ST. LOUIS, MISSOURI

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March 12, 1996

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SUMMARY

The City of Ann Arbor, Michigan; the City of Dubuque, Iowa; the Consolidated City of Indianapolis, Indiana; Montgomery County, Maryland; and the City of St. Louis, Missouri (the "Local Franchise Authority Coalition"), strongly oppose the NPRM's proposal and the modifications proposed by the industry because they attempt to circumvent basic rate regulation and the franchise-based structure required by the Cable Act; would increase subscriber rates and subscriber confusion; would increase burdens on local franchising authorities; and would not achieve the Commission's stated goals.

The various proposals introduced by the NPRM and the cable industry would amount to the repeal of basic rate regulation, in violation of the 1992 Cable Act. The Cable Act establishes a franchise-based rate regulation scheme, and does not include rates in neighboring communities among the factors to be considered in setting rates. Averaging rates across multiple franchise areas pulls the structure of the industry out by its roots and contradicts the principles on which basic rate regulation was established. In addition, the result of the "uniform" rate proposals would be rate increases for many subscribers, even for subscribers whose rates have already been deemed reasonable by the Commission. To permit such a result can only be considered tantamount to repeal of all the work done by local franchising authorities and the Commission for the last three years, and will further convince franchising authorities that there is nothing to be gained by continued regulation.

The proposal to permit exclusion of franchise-related costs when advertising rates amounts to consumer fraud. The record makes plain that cable operators do not want to charge uniform rates; they want to be able to advertise "uniform" rates while continuing to charge subscribers non-uniform, franchise-specific rates. No other industry is permitted to exclude a major cost item, which all subscribers have to pay, when advertising its prices. Unlike the taxes and long distance charges to which the industry seeks to analogize, franchise fees and franchise-related costs are rent for the use of public rights-of-way, and thus are a cost of doing business properly reflected in the retail price. They are not taxes, and they are not charges for particular services that a subscriber can avoid, like roaming fees and long distance charges. By seeking to separate out franchise fees and costs in such a deceptive manner, the proposals impermissibly depart from the Cable Act, which requires that cable systems be responsive to local needs and interests as determined by each individual franchising authority.

A new uniform rate structure is also unnecessary, because operators already have the authority to set uniform rates, so long as they do not exceed the maximum rates permitted by the Commission's rules. Nothing in the rules requires an operator to charge the maximum rate, or states that operators are entitled to be shielded from the vicissitudes that other businesses must normally face.

The uniform rate proposal is also flawed because it will not have the desired effects. It will not result in uniform rates, because franchise-related costs means that rates will still be non-uniform. The proposal will not protect subscribers from unreasonable rates, because many subscribers will see rate increases. The proposal will increase, not reduce, subscriber confusion, because rates will still be non-uniform, but subscribers will now see ads suggesting otherwise. There is no evidence whatsoever that the proposal will increase penetration rates, nor is there substantial evidence that it will lower advertising costs.

Without question, the proposal will increase administrative burdens on franchising authorities. And the proposal will present operators with a windfall unless the results of any alleged efficiencies are deducted from the basic rate. Thus, the proposal will further complicate the rate regulation process and will not simplify it. Since the proposal will not achieve any of its intended purposes, it is entirely indefensible.

The specific recommendations offered by the cable industry only make matters worse. They will provide so much flexibility that operators will be free to include or exclude systems practically at will, and neither the Commission nor franchising authorities will have any meaningful control over the outcome. The industry modifications exacerbate the weaknesses of the Commission's original proposal by allowing operators to charge a "uniform" rate despite the fact that systems vary substantially in number of channels and program offerings. Finally, allowing broad equipment averaging will mean that subscribers with older depreciated equipment will be forced to subsidize subscribers using new, more expensive equipment.

In sum, none of the proposals would actually establish truly uniform rates, and all would allow operators to charge unreasonable rates and increase rates on many if not most subscribers. The proposals should therefore be abandoned entirely.

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JOINT REPLY COMMENTS OF THE CITY OF ANN ARBOR, MICHIGAN; THE CITY OF DUBUQUE, IOWA; THE CONSOLIDATED CITY OF INDIANAPOLIS, INDIANA; MONTGOMERY COUNTY, MARYLAND; AND THE CITY OF ST. LOUIS, MISSOURI

The City of Ann Arbor, Michigan; the City of Dubuque, Iowa; the Consolidated City of Indianapolis, Indiana; Montgomery County, Maryland; and the City of St. Louis, Missouri (the "Local Franchise Authority Coalition"), hereby file their joint reply comments in response to the Notice of Proposed Rulemaking (the "NPRM"), released on November 29, 1996, and the opening comments in this proceeding. The Local Franchising Authority Coalition strongly opposes the proposals in the NPRM, as well as the modifications proposed by the industry. We also strongly endorse the comments filed by the National Association of Telecommunications Officers and Advisors ("NATOA"). If adopted, the NPRM proposals would result in circumvention of basic rate regulation; result in increased subscriber confusion; impose impractical new burdens on local franchising authorities; and would fail to achieve the Commission's goals, as stated in the NPRM.

At bottom, the proposals in the NPRM would not result in uniform rates at all. Instead, they would merely permit operators to engage in deceptive advertising of a supposed "uniform" rate when in fact the rates charged would still vary by franchise area. We submit it is not the Commission's role to condone such massive subscriber deception.

I. THE COMMISSION'S PROPOSAL IS SELF-CONTRADICTORY.

The Commission's proposal to establish a methodology to allow cable operators to set "uniform" rates across franchise area boundaries is illogical and self-contradictory. It improperly attempts to circumvent two fundamental requirements of the Cable Act: that basic rate regulation is to be carried out by local franchising authorities, 47 U.S.C. § 543(a)(2)(A), and that cable systems shall be "responsive to the needs and interests of the local community" as separately determined by each local cable franchising authority. 47 U.S.C. §521(2).

The Commission has spent the last three years trying to establish a scheme for ensuring reasonable cable rates, and long ago the Cable Act confirmed that cable systems must be responsive to <u>local</u> community needs as determined by the local franchising authority Yet now the industry denigrates the role of local franchising authorities and seeks to persuade the Commission to adopt a complicated system of pseudo-uniform rates that amounts to the repeal of local rate regulation and condones massive consumer fraud.

A. The Proposal Is Self-Contradictory Because It Claims To Regulate Rates While In Fact Permitting Uncontrolled Rate Increases.

The "uniform" rate proposal contradicts itself because it effectively destroys rate regulation. Indeed, if the proposal were adopted, it is hard to see how the Commission would be able to publicly declare that any meaningful form of rate regulation was still in effect. When one considers the many deleterious effects of the proposal, it is clear that what will remain will be only a sham regulatory scheme, in which the players may go through the motions, but the operators will in essence charge what they will, because it will be virtually impossible for the Commission or local franchising authorities to oversee effectively cable operators' implementation of the scheme. We find it particularly difficult to understand how the Commission can justify this proposal after it has spent three years developing the current franchise-based system, all along claiming it was acting in the interests of subscribers.

The justification for the various schemes that have been proposed is ostensibly that they are "revenue neutral." In reality, however, they would not be revenue neutral at all. As an initial matter, the proposals are not revenue neutral when unregulated rates are allowed to be included in the calculations. There are many reasons that a community may have decided not to regulate rates, and the NPRM's inference -- the absence of regulation must mean rates are reasonable -- is unjustified. In fact, most communities that refrain from regulation do so either because the costs to do so are deemed prohibitive or because they believe the FCC's current rules do not adequately protect subscribers. And a scheme is not revenue neutral when small systems, which have been given explicit license to charge higher rates by the Commission, are included.

In addition, by allowing the averaging of rates in different franchise areas, many subscribers -- approximately half, if not more -- will see their overall rates <u>increase</u> using the NPRM's own models. Thus, <u>none</u> of the NPRM's proposals is revenue neutral to those subscribers whose rates will go up as a result of some sort of averaging process. This is a bizarre result, given that if a community has followed the Commission's rules in regulating rates to date, any rate higher than the maximum permitted is per se unreasonable. To be sure, the industry may argue that the Commission could have come up with some other method of setting maximum rates, which might have led to different "reasonable" rates, but the fact is that the Commission did not do so. Either a rate that exceeds the maximum permitted by the Commission's rules is reasonable, or it is not. Any higher rate is unreasonable, and any argument to the contrary is sophistry.

Not surprisingly, the industry commenters say nothing of the demoralizing effect their proposals will have on communities that have sought in good faith to protect consumers by exercising the rate regulatory authority granted them by Congress and the Commission's earlier rules. Of course, the industry is well aware of this and silently applauds. But the Commission is responsible for overseeing the system as a whole, not for ensuring that cable operators have the wherewithal to compete with the telephone and direct broadcast satellite ("DBS") industries through cross-subsidized rates in areas where the operator faces no competition.

Averaging rates across franchise boundaries will eliminate any incentive communities have to continue to protect subscribers by regulating rates. If a community does succeed in lowering rates, only to have them raised through whatever area-wide process the Commission might adopt, there will be no incentive for the community to continue to review rates, or for other communities to regulate. There is no point in a few communities bearing the cost of regulating when their rates are not going to go down anyway. In theory, communities above the average level would benefit from the process in the short run, but once they have received that initial reduction they too will have no incentive to continue. The result would be the end of basic rate regulation, even though Congress specifically voted to retain basic rate regulation in the Telecommunications Act of 1996.

Contrary to the Comments of the National Cable Television Association ("NCTA"), at p. 5, we submit that the Commission has no authority to permit averaging of rates across franchise boundaries, at least not for basic rates. The 1992 Cable Act very clearly expected that basic rate regulation would be conducted at the local franchising authority level, as it always had been. Neither of the methodologies proposed in the NPRM meets that requirement. 47 U.S.C. § 543(a)(2) states that "If the Commission finds that a cable system is not subject to effective competition . . . the rates for the provision of basic cable service shall be subject to regulation by a franchising authority . . . ." The "uniform" rate proposal would not meet that requirement. Franchising authorities currently must implement a rate regulation scheme that is entirely controlled by Commission-established benchmarks and rules; if the Commission takes the next step and permits rates for basic service to be based on rates in surrounding areas, effectively requiring each local franchising authority to investigate rate calculations for scores of other jurisdictions just to calculate its own rates, the Commission will have removed the last pretense that basic rates are subject to local regulation. In addition, we note that 47 U.S.C. § 543(b)(2)(C), which lists the factors the Commission may consider in regulating rates, says nothing about rates in neighboring systems. The only reference in the Act to rates outside a particular franchise area is to rates for systems subject to effective competition.

Many of the industry's specific recommendations also violate the principle of local regulation of basic rates, or make the scheme practically impossible to administer. For example, the Ohio Cable Television Association ("OCTA") argues that only the Commission should have the authority to review the initial calculation of "uniform" rates, even though those rates would of course include calculating basic rates in each of the affected franchise areas. This would clearly violate the Cable Act, by removing franchising authorities' ability to set initial basic rates. OCTA and other commenters also recommend that franchising authorities be given very short time frames in which to review subsequent rate increases. For instance, OCTA would give communities only 90 days in which to issue a rate order. This is, to say the least, sheer hypocrisy. The Commission itself has taken far longer than 90 days to review practically every rate filing it has received, and often has taken a year or more to resolve a rate case. Imposing unrealistically short deadlines on franchising authorities, while simultaneously complicating their job by requiring them to make broader investigations beyond franchise boundaries, amounts to the repeal of rate regulation, because communities will be unable to respond in time to regulate effectively.

The proposals will also reduce the effectiveness of rate regulation by increasing administrative burdens on local franchising authorities, despite the NPRM's claims to the contrary. The burdens that the proposals would cause for the City of St. Louis provide just one example of the scope of the problem. Including the City of St. Louis, TCI operates systems under 13 different franchises with <u>13</u> different jurisdictions in just the greater St. Louis area alone. Including the City, Continental operates systems under 21 different franchises with <u>21</u> different jurisdictions in the greater St. Louis area.

Under the proposals, the City of St. Louis would have to review rate and franchise-cost calculations for <u>13 different</u> TCI franchises just to determine whether TCI's "uniform rate" for the City were calculated correctly. And the City would have to perform the same review under <u>21 different</u> Continental franchises to determine whether Continental's "uniform" rate in the City were correct.

Thus, the proposals would increase the administrative burden on the City <u>by over 30 times</u>, and that assumes TCI and Continental would provide the City with information concerning their rate and cost calculations in those other jurisdictions. Given the past history of obtaining information just relating to the City, it seems doubtful that the City would ever be able to obtain the necessary information, even assuming it could possibly absorb the massive increase in workload. The result is clear: rates would, in all likelihood, be effectively deregulated.

Finally, even if a community chose to persevere, how would it know that the rate set under either of the NPRM's proposals is accurate -- not to mention under the many industry proposals, which would give operators carte blanche to set rates in any way they choose? To verify the new rate, a community would have to obtain the rate and back-up information from all of the franchise areas used by the operator, verify that they were accurate, and then confirm that the calculations had been done correctly for each area. There is simply no escaping the fact that the proposals would add substantially new burdens on local franchising authorities, in violation of the NPRM's stated objective of lessening burdens on franchising authorities. There is simply no way that any of the proposed approaches would reduce the administrative burden on franchising authorities, other than to encourage them to abandon rate regulation entirely. In sum, the proposals merely undermine the rate regulation process to the point of uselessness, without any net benefit to subscribers.

B. The Proposal is Self-Contradictory Because It Is Not Possible to Establish Truly Uniform Rates If Franchise Fees and Franchise-Related Costs Are Excluded from Averaging.

All of the proposals in the NPRM and the industry's comments rest on an internal contradiction: they profess to seek to charge "uniform" rates but insist, inconsistently, that franchise fees and franchise-related costs be treated differently than all other costs of providing cable service and not averaged across franchise areas.

What this means, of course, is that whatever so-called "uniform" rates an operator might advertise will not be "uniform" at all. Instead, rates will still vary from franchise area to franchise area, but subscribers will be deceived by advertising suggesting that rates are "uniform" when they are not. The concept of allowing a business to advertise a "uniform" price but actually charge a higher prices is, to say the least, unique. Indeed, in any other industry it would be considered a deceptive trade practice under state and federal law.

What each of the proposals ignores is that (1) franchise fees and franchise-related costs are, like programming costs and salaries, part of a cable operator's cost of doing business; and (2) franchise variances are part and parcel of the <u>goal</u> of Congress in the Cable Act, a goal left unchanged by the recently enacted Telecommunications Act of 1996. Different franchising authorities, of course, have negotiated different levels of compensation for the use of their rights-of-way. That is exactly what the Cable Act calls for: cable systems must satisfy <u>local</u>

community needs and interests as determined separately by each local franchising authority. See 47 U.S.C. §§ 521(2) and 546.

1. Franchise Fees and Franchise-Related Requirements Are Rent for the Use of Rights-of-Way, and thus a Cost of Providing Cable Service.

There is no doubt under the law that franchise fees are generally considered rent for use of public property. There is equally no doubt that franchise-related costs, including PEG channels, are also a cost of doing business for a cable operator. Franchising authorities do not impose those requirements at will. A franchise is a contract between a local community and a cable operator, and the contents of a franchise are always a matter of negotiation between the parties. Cable operators routinely refuse to agree to proposed franchise requirements that they believe would preclude them from profitably operating a system. The fact is that cable operators set a value on access to rights-of-way and will pay communities in the form of a combination of franchise fees and franchise-related costs. If a community asks for more than an operator is willing to pay, the operator will reject the proposal and continue to negotiate until the request is reduced or other concessions of value to the operator are made, or, alternatively, the operator will exercise its protective rights under 47 U.S.C. § 545 or § 546. Thus, franchise fees and franchise-related costs together are simply one of many costs of providing cable service, contractually entered into by the operators as a result of free negotiations In no sense are franchise fees a tax.[1]

There is a long line of precedent that distinguishes between a fee and a tax. The concept of a franchise fee is neither unique to the cable television industry, nor of recent vintage. Over a century ago, the Supreme Court held that a franchise fee is not a tax but rent for use of local rights-of-way, and since that time courts have reached the same conclusion again and again.

In City of St. Louis v. Western Union Telegraph Co., 148 U.S. 92, 13 S. Ct. 485 (1893), the U.S. Supreme Court held that fees charged by a municipality for the use of its rights-of-way were not taxes, but compensation for the use of municipal property. The City had enacted an ordinance requiring all telegraph and telephone companies in the City to pay a fee of $5.00 for every pole used by them in the City, for the privilege of using the City's streets. Western Union refused to

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[1] In this respect, franchise costs are fundamentally different than taxes. A franchise is a negotiated contract, just like many other contractual costs a cable operator incurs in conducting its business. And the renewal and modification provisions of the Cable Act, 47 U.S.C. §§ 545 and 546, give cable operators considerable protection from any unreasonable contractual demands by a franchising authority. Indeed, given skyrocketing programming costs, it would seem that franchise costs are far more controllable by the operator than programming costs, yet the NPRM does not proposed to allow operators to advertize a "uniform" rate exclusive of programming costs.

But even if franchise costs were, however, somehow considered outside an operator's control, that does not mean they are not costs of doing business. We are confident, for example, that if other businesses sought to advertise a retail price "exclusive of federal income tax expense and local property tax expense," authorities responsible for enforcing deceptive trade practice laws would not look favorably on such a practice.

pay the fee, arguing that it was a license tax beyond the City's authority to impose. The Supreme Court rejected Western Union's argument, saying:

> If, instead of occupying the streets and public places with its telegraph poles, the company should do what it may rightfully do, purchase ground in the various blocks from private individuals, and to such ground remove its poles, the section would no longer have any application to it. That by it the city receives something which it may use as revenue does not determine the character of the charge or make it a tax. The revenues of a municipality may come from rentals as legitimately and as properly as from taxes. . . . That this is not a tax upon the property of the corporation, or upon its business, or for the privilege of doing business, is thus disclosed by the very terms of the section. The city has attempted to make the telegraph company pay for appropriating to its own and sole use a part of the streets and public places of the city. It is seeking to collect rent.

13 S. Ct. at 487.[2]

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[2] Supreme Court precedent makes equally clear that a governmental entity may regulate access to property under its control and charge a fee for such access. In U.S. Postal Service v. Council of Greenburgh Civic Ass'ns, et al., 453 U.S. 114 (1981), the Court found that "the First Amendment does not guarantee access to property simply because it is owned or controlled by the government. . . . 'The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.'" Id. at 129-130 (citations omitted). Accord, Hague v. CIO, 307 U.S. 496, 515 (1939) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public . . ."); Erie Telecommunications, Inc. v. City of Erie, 659 F. Supp. 580, 595 (W.D. Pa. 1987), aff'd, 853 F.2d 1084 (3d Cir. 1988). Similarly, in Gannett Satellite Information Network, Inc. v. Metropolitan Transportation Authority, 745 F.2d 767, 775 (2d Cir. 1984), the court upheld a license fee on newsracks based on the fact that the fee was rent for the right to occupy the public space taken up by the newsracks: "[i]f Gannett were to place its newsracks on privately owned business property it undoubtedly would have to pay rent to the owner of the property. The fact that the business property in question is owned by the MTA should confer no special benefit on Gannett."

In light of this precedent, it should hardly be surprising that virtually all courts that have addressed the issue of cable franchise fees have held that fees are rent for a cable operator's use of local rights-of-way.[3] As one court put it:

> This Court reads the Allegheny City v. Railway case [159 Pa. 411, 28 A. 202 (1893)] to suggest two principal justifications for permitting a local governmental entity to rent or franchise the public rights-of-way: the need for the entity, first, to operate as a proprietor when dealing with private commercial enterprises and, second, and interrelated, to protect the public interest. Surely, it would be unreasonable to require a city to provide public property at a nominal rental fee to a business which intends to directly utilize this land for the realization of profits. The mere happenstance that a commercial enterprise operates on public properties, should not provide an exemption for costs which accompany the doing of business. [Citations omitted.] Moreover, as a city holds the streets in trust for the public, it would be a dereliction of a city's fiduciary duty to grant franchise rights, particularly where the grant acts to exclude other members of the public, without receiving the fair market value for the property.

Erie Telecommunications, 659 F. Supp. at 595.

Indeed, even the legislative history of the 1984 Cable Act notes that franchise fees are analogous to rent: "Each local franchising authority may assess the cable operator a fee for the operator's use of public ways."[4]

As contractual compensation for use of rights-of-way, franchise fees and franchise-related costs are merely one of several expenses incurred by a cable operator in operating its system, and they should be treated accordingly. We are

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[3] See, e.g., Telesat Cablevision, Inc. v. City of Riviera Beach, 773 F. Supp. 383, 407 (S.D. Fla. 1991); Century Federal, Inc. v. City of Palo Alto, 710 F. Supp. 1559, 1567 (N.D. Cal. 1988); Group W Cable, Inc. v. City of Santa Cruz, 669 F. Supp. 954, 962-63, 972-74 (N.D. Cal. 1987), further proceedings, 679 F. Supp. 977, 979 (1988); Erie Telecommunications, 659 F. Supp. at 594.

[4] H. Rep. No. 98-934 (Aug. 1, 1984), reprinted in 1984 U.S.C.C.A.N. 4655, 4663.

confident, for instance, that neither the Commission nor any operator would claim that an operator should be allowed to advertise a "uniform" rate exclusive of payroll, office rent, or cost of programming.

The industry, of course, professes to be very concerned with public disclosure of franchise fees and franchise-related costs, ostensibly because "subscribers have the right to know the magnitude and assess the benefit of the cost." Comments of Tele-Communications, Inc. ("TCI") at p. 8. But subscribers may be said to have the right to know many things. For instance, subscribers might want to know TCI's profit margin, or TCI's actual programming costs and cash flow margin, or perhaps the amount of Time Warner's retail price that is going to the heirs of Mr. Ross -- yet for all their supposed interest in public disclosure, cable operators do not itemize those figures on their bills.

In any event, the entire "accountability" issue is a red herring. The issue is not whether operators can itemize franchise fees and costs. The Cable Act and Commission rules already allow them to do so. The issue is whether operators should be allowed to advertise a "uniform" price that is not a retail price at all (because it excludes selected costs of doing business) and that is not uniform at all when the costs are included. We submit that the Cable Act does not sanction the deceptive trade practice of suggesting to subscribers that rates are uniform when they are not, and that franchise costs are not recovered as part of the retail price of cable service, when in fact they are.

2. No Other Industry Excludes Rent Costs From Its Rates When Advertising Its Services to the Public.

No industry of which we are aware advertises prices that exclude a major cost of doing business, only to add the amount in bills charged to subscribers. Indeed, any company that tried to do so would quickly find itself charged with deceptive advertising or consumer fraud. An example will prove the point. Suppose a furniture retailer has several outlets over a metropolitan area. Its rental costs to lease retail space at these various locations vary from location to location. We doubt, however, that the furniture retailer would try to advertise a "uniform" price for sofas "exclusive of" the retailer's rental costs at each store, which no doubt vary from store location to location. Customers would be surprised to find out that the advertised "uniform" price for the sofa was not the actual retail price of the sofa at all. They also would be surprised to earn that the price of the sofa varies from store to store, and by an amount undisclosed in the retailer's advertisements. Yet this deceptive practice is precisely what the cable industry boldly asks the Commission to sanction here.

The cable industry knows full well that franchise fees and franchise-related costs are costs of providing cable service. (One would only need to look at operators' financial statements to see that fact, except cable operators never disclose such statements) In negotiations with cities and counties all across the country, cable operators repeatedly acknowledge that franchise costs are a cost of doing business, no matter how much they suggest otherwise in their comments here. The Commission's Cable Services Bureau was recently led astray on this issue in a different context,[5] but we are confident that it will eventually recognize its error. The Commission, however, must not allow the industry's self-serving pleadings to confuse it concerning the true nature of franchise fees and costs.

Time Warner, for example, asserts that other telecommunications industries advertise uniform rates, but that consumers know that there will be additional charges, such as taxes and various fees. Thus, according to Time Warner, it would be acceptable for the Commission to sanctify a "uniform" rate scheme that allows franchise costs to be itemized separately. But Time Warner's analogies are inapt. The cellular and long-distance industries do not exclude from their advertised rates such items as the rent they pay for space on towers or office space. And other additional charges Time Warner refer to are either taxes, or items that are not part of the cellular or local carrier's retail price at all; they are the long distance carrier's retail charge that the cellular or local carrier bills and collects on behalf of the long-distance carrier.

The NPRM's "uniform" rate proposals, in contrast, would exclude franchise fees and franchise-related costs, that is, rent expenses, from an advertised retail price. As we have shown, such items are costs of providing cable service from which all subscribers benefit. They are not taxes, and they are not charges that a franchising authority imposes directly on subscribers that the cable operator merely bills and collects on the franchising authority's behalf. To the contrary, franchise

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[5] See Petition for Reconsideration of the City of Dallas, et al., United Artists Cable of Baltimore, Appeal of Local Rate Order of City of Baltimore, DA 95-737, (filed May 8, 1995).